Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1447

WILLARD WAGNER,

Petitioner,

vs.

JOYCE ANN WAGNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has Petitioner exhausted all available remedies prior to his appeal?
2. Has Petitioner forfeited his right to appeal?
3. Is a natural father's right to visitation subservient to the best interests and welfare of his infant daughter?

SUPPLEMENTAL STATEMENT OF FACTS

Seven (7) doctors and psychologists testified in the Trial Court. Most, if not all of said experts, stated the Defendant was suffering from different degrees of mental illness. Allegations were made that the Defendant attempted sexually perverted acts with his three year old daughter. The alleged acts ranged from attempted sodomy to the fondling of the child's vagina.

REASONS FOR DENYING THE WRIT

I. Petitioner has an adequate remedy in the State Court to obtain visitation.

The Trial Court decided that the petitioner suffered from serious emotional problems. (P. App. 35) Such finding was made after two (2) psychiatrists (Dr. Bacon and Dr. Geist), two (2) psychologists (Dr. Ciotola and Dr. Fredenthal) and two (2) pediatricians (Dr. Henken and Dr. Graf) stated their various opinions about the welfare of the child of the parties and the mental condition of the petitioner. All (with the exception of Dr. Henken and Dr. Graf), within various degrees stated the petitioner was emotionally ill.

The Court decided that the petitioner was in need of professional help and that after six (6) months of consulting his pyschiatrist, the Court would give the petitioner visitation rights. (P. App. 35)

In other words, if the petitioner so chose, he could have had visitation on or about June 22, 1973.

Petitioner, however, decided to ignore such opportunity and apparently decided to petition various forums for

relief. Incidentally, such opportunity still exists and is available to the petitioner at any time he sees fit.

Accordingly, it is difficult to comprehend petitioner's argument that he has been denied due process especially when a trial was held, testimony was presented and a decision was rendered based upon the evidence submitted at trial.

It is axiomatic that the petitioner must exhaust all available remedies before he will be permitted such relief in the Supreme Court.

No argument has ever been presented why the petitioner refuses to seek psychiatric help, especially when such help would ultimately give him the visitation rights he languishes for.

II. Petitioner's rights, if any, have been forfeited by failing to timely appeal his cause to the Wisconsin Supreme Court.

Petitioner fails to relate to this Court that the reason his appeal to the Wisconsin Supreme Court was denied was because he failed to appeal within the time prescribed by law.

It would seem a travesty of justice to allow a petitioner who wrongfully allows the appeal time to expire in the state forum to then argue his constitutional rights were violated because the state appellate court refused to accept his appeal.

Yakus v. United States, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660, stands for the proposition that a constitutional right may be forfeited by the failure to make a timely

assertion of the right before a tribunal having jurisdiction to determine it.

III. Parental right of visitation is not an absolute right but must yield to the best interest and welfare of a child.

The issues of visitation and custody were tried in the Family Court of Racine County. Testimony was received concerning the alleged perverted and sadistic acts of the petitioner. Numerous doctors expressed their opinions as to the petitioner's psychiatric condition as it relates to the child's best interest and welfare.

The Trial Court determined in effect that the petitioner could only visit the child *after* he obtained psychiatric help.

24 Am. Jur. 2d p. 991 states "In determining whether the parent who does not have custody of a child should be given visitation rights, it is held that the welfare and best interests of the child are the primary consideration."

Said digest on page 912 states "The fact that a parent has been cruel to his children and therefore may be expected to treat them cruelly during visits may be a sufficient ground for denying visitation rights."

The Wisconsin Supreme Court in *Neblett v. Neblett,* 274 W. 574 (1956) and *Block v. Block,* 15 W. 2d 291 (1961) has ruled that a parent's right to visitation must yield to the child's best interests and welfare (*Block* p. 298 and *Neblett* p. 578). In *Neblett,* the Court stated on page 578 ". . . the trial court would have been remiss in its duty to allow visitation without taking precautionary measures of the nature contemplated in the judgment.

The primary consideration of the court being the welfare of the children and the findings fully supporting the judgment that defendant have no right of visitation, it is for the defendant, if he desires to visit his children, to show that such visitation will be in their interests."

CONCLUSION

Petitioner had all issues concerning custody and visitation litigated; he has refused to follow the Trial Court's judgment which would have allowed visitation and accordingly, certiorari should be denied.

Respectfully submitted,

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